NO. 02-8636

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

CLYDE TIMOTHY BUNKLEY – PETITIONER

VS.

STATE OF FLORIDA – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

Clyde Timothy Bunkley

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53 pp

QUESTION PRESENTED

Whether Petitioner was denied due process of law by the State of Florida's refusal to apply the recently interpreted Florida Supreme Court definition regarding the "common pocket knife" exclusion to the weapons statute, in direct contradiction with the United States Supreme Court's recent decision in *Fiore v. White*, 531 U.S. 225 (2001)?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows:

Richard E. Doran,	Attorney General of Florida
Robert J. Krauss,	Senior Assistant Attorney General
Ronald, Napolitano,	Assistant Attorney General

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is reported at 27 Fla. L. Weekly S 967b (Fla. Nov. 21st, 2002).

JURISDICTION

The date on which the highest state court decided my case was December 12th, 2002. A copy of same appears at Appendix D.

The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause of the 14th Amendment to the U.S. Constitution

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Florida Statute Sec. 810.02 Burglary. - (1985)

> "(1) "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.
>
> (2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in Sec. 775.082, Sec. 775.083, or Sec. 775.084, if, in the course of committing the offense, the offenders:
>
> (a) Makes an assault or battery upon any person.
>
> (b) Is armed, or arms himself within such structure or conveyance, with explosives or a dangerous weapon.
>
> (3) If the offender does not make an assault or battery or is not armed, or does not arm himself, with a dangerous weapon or explosive . . ., burglary is a felony of the third degree."

Florida Statute Sec. 790.001 Definitions. - (1985)

> "(13) "Weapon" means any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocket knife."

STATEMENT OF THE CASE

Petitioner is incarcerated in a Florida prison on the charge of armed burglary. Petitioner's conviction stems from a break-in to an unoccupied, closed restaurant where Petitioner was found to have a pocket knife in his pocket at arrest. Said pocket knife had a blade length of 2 ½ to 3 inches, was in Petitioner's pocket and in a folded position (closed) at all times related to the burglary.

Petitioner was convicted by jury on April 23, 1987 and sentenced to life in prison. Petitioner's direct appeal was *per curiam* affirmed on February 17, 1989. See *Bunkley v. State*, 539 So. 2d 477 (Fla. 2d DCA 1989)(Table).

Petitioner sought post-conviction relief via a variety of motions and petitions throughout the 1990's, all to no avail.

On October 2nd, 1997, the Florida Supreme Court decided, in *L.B. v. State*, 700 So.2d 370 (Fla. 1997), that the "common pocket knife" exclusion to the weapons definition statute (Sec. 790.001 (13)) was not unconstitutionally vague, and that a folding pocket knife with a blade 4" or less in length meets that definition without question. *Id* at 373.

On September 21st, 1999, Petitioner filed a 3.850 motion for post-conviction relief related to the decision in *L.B.*. The trial court dismissed said motion, on October 19th, 1999, due to no indication as to whether *L.B.* applied retroactively.

On appeal, to the Second DCA, Petitioner was denied relief, but a question was certified to the Florida Supreme Court. See *Bunkley v. State*, 768 So. 2d 510 (Fla. 2d DCA 2000).

On November 21st, 2002, the Florida Supreme Court decided – after briefing and oral arguments – that their decision in *L.B.* did not apply retroactively, therby denying Petitioner relief. See *Bunkley v. State*, 27 Fla. L. Weekly S 967b (Fla. Nov. 21st, 2002).

Mandate issued on December 12th, 2002.

This petition follows timely.

REASONS FOR GRANTING THE PETITION

Petitioner's simple burglary, which he does not contest here, was enhanced to "armed" burglary solely on the fact that Petitioner had a pocket knife in his pocket, unopened, at the time of his arrest. The pocket knife had a 2 ½" to 3" blade, as can be seen from the face of the trial record, and was not used or brandished at all during the course of the burglary of the unoccupied (closed) restaurant.

The dangerous weapon portion of Florida's burglary statute (Sec. 810.02(2)(b) (1985) does not, itself, define "dangerous weapon". Courts in Florida, therefore, have traditionally turned to Florida's weapons statute (Sec. 790.001(13) (1985) for a conclusive definition. The weapons statute, since 1901, has included an exemption for a "common pocket knife".

There have been several lower court opinions in Florida over the years, as to what constitutes a "common pocket knife". The Florida Supreme Court, however, did not enter an opinion until October 2nd, 1997. See *L.B. v. State*, 700 So. 2d 370 (Fla. 1997). An exhaustive electronic search of every Florida Supreme Court published opinion since 1901 revealed only one other prior case that even mentioned the word "pocket knife" (*Drummer v. State*, 33 So. 1008, 1009 (Fla. 1903), and they did **not** define the term then as it was a firearm murder case.

L.B., then, cannot be seen as an evolution of the law, as it was the very first time the Supreme Court had ever interpreted the "pocket knife" exemption of Florida's weapon statute.

In *L.B.*, the Supreme Court held that the 3 ¾" long blade in that case clearly fell under **ANY** intended definition of the term "common pocket knife". See *L.B.* at 373. In so doing, the Court cited to a 1951 opinion of the Attorney General of Florida (051-358), wherein it was stated that a pocket knife with a blade of four inches in length or less was a "common pocket knife". The Court went even further, in their (#4) footnote to say that four inches is not a bright line rule (i.e. a folding knife of **MORE** that 4" blade could also be considered a "common pocket knife").

We need not go to these extremes in the instant cause, as Petitioner Bunkley's blade was a mere 2 ½" to 3" in length – thereby falling clearly within the range established by *L.B.*

There can be no doubt that the factual basis of Bunkley's case does **NOT** support an armed burglary charge. See for example *McCoy v. State*, 789 So. 2d 489 (Fla. 2d DCA 2001)(decided ten months after Bunkley's denial in that same court). See also *Walls v. State*, 730 So. 2d 294 (Fla. 1st DCA 1999); *Arroyo v. State*, 564 So. 2d 1153 (Fla. 4th DCA 1990); *State v. Nixon*, 295 So. 2d 121 (Fla. 3d DCA 1974).

The only question, then, is whether Bunkley's unlawful conviction and overwhelming sentence should be allowed to stand, in lieu of the fact that *L.B.* established that a pocket knife with a blade of 4" or less was by law a "common pocket knife" – Thereby excluding it without question from the legal definition of a "weapon".

Absent the enhancement of a "weapon", Bunkley's maximum statutory sentence is five (5) years prison. As Mr. Bunkley has already served over sixteen (16) years actual time, he should be immediately released from prison!

In *Fiore v. White*, 531 U.S. 225 (2001) this Court held that constitutional principles of due process are violated when a state convicts and incarcerates an individual for conduct that the State's "criminal statute, as properly interpreted, does not prohibit". *Id* at 228.

Fiore was briefly mentioned during oral arguments, and given a dismissive footnote in Bunkley's Florida Supreme Court opinion. Petitioner Bunkley believes that *Fiore* is directly on point, and should be applied likewise in his case.

Furthermore, the Florida Supreme Court had even recognized *Fiore's* applicability to state law. See *State v. Klayman*, 27 Fla. L. Weekly S951 (Fla. Nov. 14th, 2002), a case decided one week before the instant cause.

The bottom line is that *L.B.* clarified that Bunkley's possession of a folded pocket knife with a blade less than 4" long did not constitute criminal conduct and

thus he could not and should not have been convicted of armed burglary. Under *Fiore*, due process principles of fundamental fairness require that Bunkley be entitled to relief from his continued incarceration.

The fair administration of justice, will be seriously undermined if a criminal defendant, such as Bunkley, is required to serve a life sentence under the Florida burglary statute; while a defendant who engaged in the same conduct, under the self same statute, subsequent to *L.B.* is required to serve only five years. See *McCoy, supra*.

CONCLUSION

In conclusion, as in *Fiore*, Bunkley's "continued incarceration" on this charge violates due process because the essential element of possessing a "weapon" in order to be convicted of "armed" burglary does not, and never did, exist in Bunkley's case as *L.B.* clarified that point of law.

The petition for writ of certiorari should be granted.

Respectfully submitted,

Clyde Timothy Bunkley
Clyde T. Bunkley, *pro se*

Date: 1/13/2003

Supreme Court of Florida

No. SC01-297

CLYDE TIMOTHY BUNKLEY,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

[November 21, 2002]

SHAW, J.

We have for review Bunkley v. State, 768 So. 2d 510 (Fla. 2d DCA 2000), wherein the district court certified the following question:

> Should the decision in L.B. v. State, 700 So. 2d 370 (Fla. 1997), that a folding pocketknife with a blade of four inches or less falls within the

> statutory exception to the definition of a "weapon" found in § 790.001(13), be applied retroactively?

Bunkley, 768 So. 2d at 511. We have jurisdiction. See art. V, § 3(b)(4), Fla. Const. We answer in the negative, as explained herein.

I. FACTS

Bunkley burglarized an unoccupied Western Sizzlin' Restaurant on April 23, 1987. He was arrested at the scene and later charged with and convicted of armed burglary, possession of burglary tools, and resisting arrest without violence. In light of his fifteen prior convictions, he was sentenced to life imprisonment on the armed burglary count, five years' imprisonment on the possession of burglary tools count, and six months' imprisonment on the resisting arrest count. His convictions and sentences were affirmed.[1]

Bunkley subsequently sought postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 and the relevant facts are set forth in the district court opinion below:

> Bunkley was convicted of armed burglary after a jury trial on April 23, 1987. The arresting officer testified as to the following facts: Bunkley broke into a closed, unoccupied Western Sizzlin' Restaurant in the early morning hours, and was apprehended after leaving the structure with a common pocketknife in his pocket. At the time of Bunkley's arrest, the pocketknife, with a blade of 2½ to 3 inches in

1. See Bunkley v. State, 539 So. 2d 477 (Fla. 2d DCA 1989).

> length, was folded and in his pocket. There is no evidence indicating Bunkley ever used the pocketknife during the burglary, nor that he threatened anyone with the pocketknife at any time.
>
> In his rule 3.850 motion, Bunkley contends the trial court erroneously allowed the jury to determine whether the pocketknife found in his possession could be considered a deadly weapon, rather than concluding it was not as a matter of law. Bunkley concedes that his motion was filed more than two years after his convictions on April 23, 1987, became final. He contends, however, that the arguments raised in his motion were not supported by case law until the supreme court decided L.B. v. State, 700 So. 2d 370 (Fla. 1997), and that he filed his motion within two years from the date of that decision.
>
> In L.B., the Florida Supreme Court reversed this court's decision finding section 790.001(13), Florida Statutes (1995), unconstitutionally vague. At issue was the exclusion of a "common pocketknife" from the definition of "weapon" in section 790.001(13). The Florida Supreme Court found that the statutory term was not so vague as to fail to put people of ordinary intelligence on notice of what constitutes forbidden conduct under the statute. To define the term, the court relied upon an Attorney General's opinion that a common pocketknife was one with a blade of four inches or less.

Bunkley, 768 So. 2d at 510 (citations omitted). The district court declined to apply L.B. retroactively, affirmed the denial of rule 3.850 relief, and certified the above question.

The issue presented in this case, i.e., whether a decision of this Court must be applied retroactively, is a pure question of law, subject to de novo review.[2]

II. L.B. v. STATE

2. See State v. Glatzmayer, 789 So. 2d 297, 301-02 n.7 (Fla. 2001) ("If the ruling consists of a pure question of law, the ruling is subject to de novo review.").

The petitioner in L.B. v. State, 700 So. 2d 370 (Fla. 1997), was charged with and convicted of possessing a "weapon" on school grounds based on her possession of a folding knife with a 3¾-inch blade:

> At trial, the court considered whether petitioner's knife fit within the "common pocketknife" exception to the definition of "weapon" contained in section 790.001(13), Florida Statutes (1995). Section 790.001(13) provides:
>
> > "Weapon" means any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocketknife.
>
> The trial court found that petitioner's knife was too large to be considered a "common pocketknife," and was therefore a "weapon" within the meaning of sections 790.001(13) and 790.115(2). Accordingly, the trial court found appellant guilty of the violation.
>
> On appeal, the Second District vacated the trial court's order and remanded the case for a new trial. The district court held that section 790.001(13) is unconstitutionally vague insofar as it excludes "common pocketknives" from the definition of "weapon."

L.B., 700 So. 2d at 371 (footnote and citations omitted).

This Court disagreed that the phrase "common pocketknife" was unconstitutionally vague:

> The legislature's failure to define the term "common pocketknife" in section 790.001(13) does not render that term unconstitutionally vague. Moreover, a court may refer to a dictionary to ascertain the plain and ordinary meaning which the legislature intended to ascribe to the term.
>
> [The Court then set forth dictionary definitions of the terms

> "common" and "pocketknife."] From these definitions, we can infer that the legislature's intended definition of "common pocketknife" was: "A type of knife occurring frequently in the community which has a blade that folds into the handle and that can be carried in one's pocket." We believe that in the vast majority of cases, it will be evident to citizens and fact-finders whether one's pocketknife is a "common" pocketknife under any intended definition of that term.

L.B., 700 So. 2d at 372 (citations omitted).

The Court concluded that the petitioner's knife plainly fell within the meaning of "common pocketknife" but added the following caveat:

> We note that neither the Attorney General nor this Court maintains that four inches is a bright line cutoff for determining whether a particular knife is a "common pocketknife." We merely hold that appellant's knife fits within the exception to the definition of weapon found in section 790.001(13).

L.B., 700 So. 2d at 373 n.4.

III. THE APPLICABLE STATUTES

The burglary statute, which differentiates between simple and armed burglary, provides in relevant part:

> 810.02 Burglary.—
>
> (1) "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.
>
> (2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment . . . if, in the course of committing the offense, the offender:
>
> . . . .

(b) Is armed, or arms himself within such structure or conveyance, with explosives or a dangerous weapon.

(3) . . . Otherwise, burglary is a felony of the third degree, punishable [by a term of imprisonment not exceeding five years].

§ 810.02, Fla. Stat. (1985) (emphasis added).

The phrase "dangerous weapon" has appeared in the above statute since it was enacted in 1895[3] and is not defined therein. To determine the meaning of that phrase, courts traditionally have turned to chapter 790, Florida Statutes, entitled "Weapons and Firearms." Section 790.001 defines the term "weapon" and expressly excepts a "common pocketknife":

(13) "Weapon" means any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocketknife.

§ 790.001(13), Fla. Stat. (1985) (emphasis added).[4] This definition was based on the description of "weapon" found in the precursor statute, section 790.01, which was enacted in 1901 and also excepted a "common pocketknife."[5]

IV. CHANGES IN THE LAW

Intent is a polestar that guides a court's inquiry into whether a change in the

3. See ch. 4405, § 1, at 167-68, Laws of Fla. (1895).

4. See ch. 69-306, § 1, at 1106, Laws of Fla.

5. See ch. 4928, § 1, at 57, Laws of Fla. (1901).

law should be given prospective or retroactive application. As a rule, a change in the statutory law is presumed to operate prospectively absent a clear showing of contrary intent.[6] A change in the decisional law in a nonfinal case, on the other hand, is presumed to operate in all other nonfinal cases.[7] A change in either the statutory or decisional law may operate retroactively when retroactive application is expressly provided,[8] but regardless of intent, the issue of retroactivity is ultimately controlled by overarching constitutional principles.

The Court in Witt v. State, 387 So. 2d 922 (Fla. 1980), was confronted with the following question: must a change in the law that is announced in a nonfinal case be applied in final cases?[9] The Court held that only "jurisprudential upheavals" will

6. See, e.g., Bates v. State, 750 So. 2d 6, 10 (Fla. 1999).

7. See Smith v. State, 598 So. 2d 1063 (Fla. 1992).

8. See, e.g., Bates, 750 So. 2d at 10.

9. The Court in subsequent cases was confronted with the following question: must a change in the law that is announced in a final case be applied in other final cases? The Court answered as explained therein. See, e.g., Ferguson v. State, 789 So. 2d 306 (Fla. 2001) (applying retroactively Carter v. State, 706 So. 2d 873 (Fla. 1997), wherein the Court held that a judicial determination of competency is required in certain postconviction cases); Johnston v. Moore, 789 So. 2d 262 (Fla. 2001) (declining to apply retroactively Stephens v. State, 748 So. 2d 1028 (Fla. 1999), wherein the Court announced a revised standard of review for ineffectiveness claims); Mitchell v. Moore, 786 So. 2d 521 (Fla. 2001) (applying retroactively the decision in the same case, i.e., Mitchell, wherein the Court held that a photocopy requirement for postconviction pleadings impermissibly burdened

be applied in final cases, and that "evolutionary refinements" in the law will not be applied in final cases. The Court explained:

> We emphasize at this point that only major constitutional changes of law will be cognizable . . . under Rule 3.850. Although specific determinations regarding the significance of various legal developments must be made on a case-by-case basis, history shows that most major constitutional changes are likely to fall within two broad categories. The first are those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties. This category is exemplified by Coker v. Georgia, which held that the imposition of the death penalty for the crime of rape of an adult woman is forbidden by the eighth amendment as cruel and unusual punishment. The second are those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter. Gideon v. Wainwright, of course, is the prime example of a law change included within this category.
>
> In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters. Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgment of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.

Witt, 387 So. 2d at 929-30 (citations and footnotes omitted).

In brief, changes in the decisional law are divided into two subgroups for retroactivity purposes. A "jurisprudential upheaval" is a major constitutional

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indigent defendants).

change of law, announced by either this Court or the United States Supreme Court, that addresses a basic unfairness in the system. The unfairness must be so fundamental that it undermines confidence in the validity of final cases and outweighs the doctrine of finality.[10] An "evolutionary refinement," on the other hand, is a conventional change that affords new or different guidelines for Florida courts in exercising their authority in applying the law.[11] Jurisprudential upheavals

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10. For examples of jurisprudential upheavals, see the following: James v. State, 615 So. 2d 668 (Fla. 1993) (addressing Espinosa v. Florida, 505 U.S. 1079 (1992), wherein Florida's jury instruction on the "heinous, atrocious, or cruel" aggravating circumstance was held to be impermissibly vague under the Eighth Amendment); Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989) (addressing Booth v. Maryland, 482 U.S. 496 (1987), wherein the use of victim impact evidence in a capital trial was held to be irrelevant and impermissibly inflammatory in violation of the Eighth Amendment; the United States Supreme Court later receded from Booth in Payne v. Tennessee, 501 U.S. 808 (1991)); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987) (addressing Hitchcock v. Dugger, 481 U.S. 393 (1987), wherein Florida's jury instructions in capital cases were held to impermissibly limit the sentencer's consideration of nonstatutory mitigating circumstances in violation of the Eighth Amendment).

11. For examples of evolutionary refinements, see the following: State v. Woodley, 695 So. 2d 297 (Fla. 1997) (addressing State v. Gray, 654 So. 2d 552 (Fla. 1995), wherein the Court held that the legal basis for the crime of attempted felony murder was too cumbersome to be countenanced any longer by the courts); State v. Glenn, 558 So. 2d 4 (Fla. 1990) (addressing Carawan v. State, 515 So. 2d 161 (Fla. 1987), wherein the Court announced a revised procedure for determining whether multiple convictions can arise from a single criminal act under Blockburger v. United States, 284 U.S. 299 (1932)); McCuiston v. State, 534 So. 2d 1144 (Fla. 1988) (addressing Whitehead v. State, 498 So. 2d 863 (Fla. 1986), wherein the Court held that habitual offender status is an invalid ground for departure from the sentencing guidelines).

are applied retroactively; evolutionary refinements are not applied retroactively. We add that, as opposed to "changes" in the law, an entirely separate body of precedent, i.e., "clarifications" in the law, has no application under Florida law in the context of retroactivity.[12]

V. THE PRESENT CASE

In analyzing the retroactivity of L.B. under Witt, we are called upon to determine whether L.B. was a "jurisprudential upheaval" or an "evolutionary refinement" in the law. As noted above, a jurisprudential upheaval is a "major constitutional change of law." Examples include Gideon v. Wainwright, 372 U.S. 335 (1963), and Coker v. Georgia, 433 U.S. 584 (1977). L.B. clearly was not a decision of that order, for L.B. was a routine statutory construction case wherein this Court construed the phrase "common pocketknife."

Rather, L.B. was an "evolutionary refinement" in the law, i.e., it was a

12. The United States Supreme Court, in addressing a decision rendered under Pennsylvania law, pointed out that certain decisions are not subject to a retroactivity analysis:

> The Pennsylvania Supreme Court's reply specifies that the interpretation of [the statute] set out in Scarpone "merely clarified" the statute and was the law of Pennsylvania—as properly interpreted—at the time of Fiore's conviction. Because Scarpone was not new law, this case presents no issue of retroactivity.

Fiore v. White, 531 U.S. 225, 228 (2001). Fiore is inapplicable to the present case.

conventional change that "affords new or different guidelines" for the courts in applying the law. To determine whether a decision refines a statute, we first look to the decision itself to discern its intent. If the decision is silent or ambiguous on this point, we then look to the statute to discern its intent. Where the Legislature cedes a measure of discretion to the courts either directly[13] or by employing language that commonly requires judicial construction,[14] the Legislature intends for the courts to effectuate the purpose of the statute by "refining" the decisional law in the face of "evolving" circumstances.

The Legislature, at the turn of the century, ceded discretion to the courts by employing the phrases "dangerous weapon" and "common pocketknife" in the

13. For example, the Legislature directly ceded to the courts the authority to formulate grounds for departing from the sentencing guidelines. See § 921.001(6), Fla. Stat. (2001) ("A court may impose a departure sentence outside the sentencing guidelines based upon circumstances or factors which reasonably justify the aggravation or mitigation of the sentence . . . .").

14. Examples of such language include "careful and prudent," "reasonable," and "probable cause." See, e.g., § 316.1925, Fla. Stat. (2001) ("Any person operating a vehicle upon the streets or highways within the state shall drive the same in a careful and prudent manner . . . .") (emphasis added); § 856.015(2), Fla. Stat. (2001) ("No adult having control of any residence shall allow an open house party to take place at said residence if any alcoholic beverage or drug is possessed or consumed . . . by any minor . . . and where the adult fails to take reasonable steps to prevent the possession or consumption of the alcoholic beverage or drug.") (emphasis added); § 933.04, Fla. Stat. (2001) ("[N]o search warrant shall be issued except upon probable cause . . . .") (emphasis added).

burglary and weapon statutes, and these phrases clearly required judicial construction in order to provide a meaningful basis for imposing sanctions. This Court's decision in L.B., which was issued in 1997, was the culmination of a century-long evolutionary process. Although some courts during that period may have interpreted "common pocketknife" contrary to the holding in L.B., each court nevertheless sought to comply with legislative intent and to rule in harmony with the law as it was interpreted at that point in time. A key consideration is that none of the courts attempted to impose criminal sanctions without statutory authority—i.e., none ruled in contravention of legislative intent. Thus, none of the convictions imposed pursuant to section 790.001(13) violated the Due Process Clause in this regard.

VI. CONCLUSION

This Court's decision in L.B. is not a jurisprudential upheaval under Witt, for L.B. was not a "major constitutional change of law." Rather, L.B. was a routine statutory construction case wherein this Court construed and refined the phrase "common pocketknife" in the face of evolving circumstances in the field. The decision thus "affords new or different" guidelines for Florida courts to use in applying the statute and is an evolutionary refinement in the law.

We answer the certified question in the negative and hold that L.B. cannot be

given retroactive application and applied to final cases. We approve Bunkley v. State, 768 So. 2d 510 (Fla. 2d DCA 2000), as explained herein.

It is so ordered.

WELLS, LEWIS, and QUINCE, JJ., and HARDING, Senior Justice, concur.
PARIENTE, J., dissents with an opinion, in which ANSTEAD, C.J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PARIENTE, J., dissenting.

I dissent because in my opinion under the recent United States Supreme Court decision in Fiore v. White, 531 U.S. 225 (2001), this Court's decision in L.B. v. State, 700 So. 2d 370 (Fla. 1997), should be applied to grant Bunkley collateral relief. If Fiore is deemed inapplicable, then in my view Bunkley is still entitled to relief based on the principles of retroactivity articulated in Witt v. State, 387 So. 2d 922 (Fla. 1980).

In this case, Bunkley was convicted of armed burglary in 1987 for breaking into an unoccupied restaurant, and received a life sentence. See Bunkley v. State, 768 So. 2d 510, 510 (Fla. 2d DCA 2000). The "weapon" that enhanced the

burglary from simple burglary to armed burglary was a common pocketknife with a blade of two-and-a-half to three inches that was folded in his pocket at the time of the burglary. See id. There was "no evidence indicating that Bunkley ever used the pocketknife during the burglary, nor that he threatened anyone with the pocketknife at any time." Id. At all pertinent times, section 790.001(13), Florida Statutes (1985), expressly excepted a "common pocketknife" from the definition of a "weapon." Subsequent to Bunkley's conviction, this Court in L.B. held for the first time that the proper definition of a "common pocketknife" included any pocketknife with a blade four inches in length or less. See 700 So. 2d at 373. Thus, any common pocketknife with a blade of four inches or less was not a "weapon" as a matter of law under section 790.001(13), the weapons statute. See id.

In my view, the principles of due process enunciated in Fiore require that Bunkley receive the benefit of the Court's clarification of the law in L.B. Fiore holds that constitutional principles of due process are violated when a state convicts and incarcerates an individual for conduct that the state's "criminal statute, as properly interpreted, does not prohibit." 531 U.S. at 228. At issue in Fiore was an opinion of the Pennsylvania Supreme Court that for the first time established that a criminal statute, as properly interpreted, did not prohibit the defendant's conduct

at the time of the conviction. See id. In those circumstances, the United States Supreme Court explained that the state supreme court had issued a clarification of the law that applied to that defendant, and retroactivity was not an issue. See id. The Court explained:

> This Court's precedents make clear that Fiore's conviction and continued incarceration on this charge violate due process. We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt. In this case, failure to possess a permit is a basic element of the crime of which Fiore was convicted. . . .
>
> The simple, inevitable conclusion is that Fiore's conviction fails to satisfy the Federal Constitution's demands.

Id. at 228-29 (emphasis supplied) (citations omitted).

This Court recently acknowledged Fiore's applicability to Florida law in State v. Klayman, 27 Fla. L. Weekly S951(Fla. Nov. 14, 2002). In Klayman, a majority of this Court stated that "a simple clarification in the law does not present an issue of retroactivity and thus does not lend itself to a Witt analysis." Id. at S952. Yet, in this case, instead of analyzing why L.B. was not a clarification in the law entitling Bunkley to relief, the majority concludes, without discussion, that Fiore is not applicable. See majority op. at 10, note 12. Rather than discussing Fiore, which does not involve a retroactivity analysis, the majority analyzes L.B. based only on the principles of Witt, concluding that L.B. was "the culmination of a century-long

evolutionary process." Majority op. at 11-12. However, the majority offers no precedent laying out the stages of this evolution.

In fact, L.B. was the first statement by this Court as to what constitutes a "common pocketknife." In reaching this determination we relied on a 1951 Attorney General Opinion, not on a definition evolved through judicial precedent. See L.B., 700 So. 2d at 373. Thus, I would find Fiore applicable to this case.

As in Fiore, this Court's statement of the law in L.B. also correctly stated the law at the time Bunkley's conviction became final. Further, like the Pennsylvania Supreme Court's clarification of its law in Fiore, the armed burglary statute as "properly interpreted," Fiore, 531 U.S. at 228, places Bunkley's conduct outside the scope of that statute. In Fiore's terms, this Court issued a "clarification" of the law of what constitutes a "common pocketknife" under section 790.001(13). Thus, as in Fiore, Bunkley's "continued incarceration" on this charge violates due process because the essential element of possessing a "weapon" in order to be convicted of armed burglary does not exist in Bunkley's case.

Because L.B. is a clarification of the law, application of the due process principles of Fiore renders a retroactivity analysis under Witt unnecessary. However, assuming, as the majority does, that our decision in L.B. was a change in the law and not a clarification, Bunkley is also entitled to relief pursuant to Witt.

Witt outlined three requirements that decisional law must meet in order to be applied retroactively. See 387 So. 2d at 931. First, the decisional law must be issued by the Florida Supreme Court or the United States Supreme Court. See id. Second, the decisional law must be constitutional in nature. See id. Third, the change in law must constitute a major constitutional change of fundamental significance "where unfairness [is] so fundamental in either process or substance that the doctrine of finality [has] to be set aside." Id. at 927. There are two categories of changes that are sufficient to constitute fundamental significance: (1) "changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" and (2) "jurisprudential upheavals" that meet the three-part test from Stovall v. Denno, 388 U.S. 293 (1967). Witt, 387 So. 2d at 929.

Our decision in L.B. undoubtedly meets the first two prongs of Witt. First, L.B. was decided by this Court. See 700 So. 2d at 373. Second, our decision in L.B. answered the question of whether the statute providing that a "common pocketknife" is not a "weapon" was unconstitutionally vague. See id. In answering that question in the negative, this Court held in the context of Florida constitutional law that any knife with a blade of less than four inches was not a "weapon" within the meaning of the statute. See id. at 372-73. Indeed, the definition of "common

pocketknife" we provided in L.B. was necessary to avoid a finding that the statute at issue was so vague as to unconstitutionally fail to give citizens proper notice as to what constituted criminal conduct. See id. at 371-73. Thus, our decision in L.B. was more than a "routine statutory construction case." Majority op. at 10 (emphasis supplied). Rather, L.B. construed a statute within the framework of our state constitution in order to ensure that citizens had legal notice at the time of the commission of the offense and to avoid declaring the statute unconstitutional, as the Second District had done. Therefore, L.B. had strong due process implications, making it constitutional in nature. Cf. Callaway v. State, 642 So. 2d 636, 640 (Fla. 2d DCA 1994) (decision is "constitutional in nature" if based primarily upon constitutional analysis), approved, 658 So. 2d 983 (Fla. 1995).

As to the third prong, I would hold that L.B. also meets the three-fold test articulated in Stovall and adopted by Witt. Under Stovall, consideration must be given to (i) the purpose to be served by the new rule, (ii) the extent of reliance on the old rule, and (iii) the effect that retroactive application of the rule will have on the administration of justice. See 388 U.S. at 297. First, L.B. serves two significant purposes. Primarily, L.B. prevents persons from being convicted of a crime for conduct never expressly prohibited by statute. L.B. also ensures that citizens are properly placed on notice as to what constitutes criminal conduct.

Both of these purposes have strong due process implications. See State v. Stevens, 714 So. 2d 347, 348 (Fla. 1998) (extending retroactivity to a decision holding that a 25-year mandatory minimum term was inapplicable to attempted second- and third-degree murder of a law enforcement officer "from the beginning" of statutory provision authorizing enhanced sentence); see also Fiore, 531 U.S. at 228-29; Callaway, 642 So. 2d at 640.

Second, Stovall requires that we consider the extent of reliance on the old rule. Although "common pocketknife" has been exempted from the definition of a "weapon" for many years, the extent of reliance is limited to very narrow circumstances. As this Court recognized in L.B., in "the vast majority of cases it will be evident whether one's particular knife is a 'common pocketknife.'" 700 So. 2d at 373.

The third factor for consideration under Stovall addresses the impact that retroactive application of the new rule will have on the administration of justice. Bunkley filed his motion for postconviction relief within two years from the date that L.B. became final. See Bunkley, 768 So. 2d at 510. The retroactive application of L.B., which would give affected inmates a two-year window to file for relief, would involve a straightforward legal issue and require, at most, a simple evidentiary hearing to determine the length of the blade of the pocketknife. Only

those defendants who could establish that the weapon they possessed was a common pocketknife of four inches or less would be entitled to relief.[15] As in Callaway, 658 So. 2d at 988, the record will normally be clear, and a determination concerning the length of the pocketknife should be accomplished easily at an evidentiary hearing.

As an overall consideration, this Court has held that when determining retroactivity, the "fundamental consideration is the balancing of the need for decisional finality against the concern for fairness and uniformity in individual cases." Id. at 986. In the ordinary case, decisional finality will trump other considerations, especially where the decision is one that applies "new or different standards for the admissibility of evidence" or pertains to issues of "procedural fairness." Witt, 387 So. 2d at 929. "In the limited number of decisions that are retroactively applied, we have determined that concerns for basic fairness and uniformity of treatment among similarly situated defendants outweigh any adverse impact that retroactive application of the rule might have on decisional finality." State v. Dixon, 730 So. 2d 265, 267 (Fla. 1999)

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15. It should be noted that in reported opinions issued in the almost five years since L.B., the Second District opinion in this case is the sole reported appellate decision discussing the retroactivity of L.B.

In my view, this case is one of those limited number of decisions where retroactive application is required. As a result of L.B., we now know that Bunkley was convicted of the crime of "armed" burglary when the essential element of possessing a "weapon" was missing. Because of this conviction, he was eligible for and received a sentence of life imprisonment. With this Court's clarification in L.B. of what constitutes a "common pocketknife," the maximum sentence Bunkley could have received for simple burglary would have been five years. See § 810.02(3), Fla. Stat, (1985). Thus, Bunkley not only was convicted for conduct that the statute has never prohibited, but he is serving a substantially longer prison term.

The fair administration of justice would be seriously undermined if a criminal defendant, such as Bunkley, is required to serve a life sentence while a criminal defendant who engaged in the same conduct subsequent to L.B. is required to serve only five years. Cf. State v. Callaway, 658 So. 2d at 987 (noting that "the administration of justice would be more detrimentally affected if criminal defendants who had the misfortune to be sentenced during the six year window between the amendment of section 775.084 and the decision in Hale are required to serve sentences two or more times as long as similarly situated defendants who happened to be sentenced after Hale"). Bunkley should thus be entitled to the benefit of this

Court's decision in L.B. because the failure to give retroactive application of our decision in L.B. results in Bunkley serving a substantially longer sentence than a similarly situated prisoner.

The majority cites State v. Woodley, 695 So. 2d 297, 298 (Fla. 1997) as support for declining to apply L.B. retroactively. See majority op. at 9. However, when we declined to find the decision in State v. Gray, 654 So. 2d 552 (Fla. 1995), retroactive in Woodley, we did so because we had receded from eleven years of our own precedent establishing attempted felony murder as a valid offense. See Woodley, 695 So. 2d at 298; see also State v. Safford, 484 So. 2d 1244 (Fla. 1986) (declining to retroactively apply State v. Neil, 457 So. 2d 481 (Fla. 1984), which changed the long-standing rule in Florida that a party could never be required to explain the reasons for exercising peremptory challenges). In contrast, L.B. established as a matter of first impression in this Court that a closed, common pocketknife with a blade of four inches or less does not meet the definition in section 790.001(13) of a "weapon." That definition was crucial to an essential element of the aggravated offense of armed burglary, which requires possessing a weapon.[16] Retroactivity under these circumstances would be consistent with

16. Subsequent to L.B., the Legislature amended section 790.115, Florida Statutes, to specifically prohibit any "knife" from being exhibited on school

Callaway and Stevens, which made first-time statutory interpretations by this Court based on constitutional grounds retroactive, and with Woodley, in which we declined to extend retroactivity to a decision receding from our own precedent.

Finally, I am concerned that the majority neither acknowledges nor discusses in the Witt analysis the fundamental purpose of due process and retroactive application; that is, ensuring fairness and uniformity of individual adjudications. See Witt, 387 So. 2d at 925. It is difficult "'to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.'" Id. These important principles of fundamental fairness are essential to any analysis regarding the retroactive application of decisions from this Court.

The bottom line is that our holding in L.B. clarified that Bunkley's possession of a folded common pocketknife did not constitute criminal conduct and thus he could not have been and should not have been convicted of armed burglary. He is now serving a sentence of life imprisonment based on that conviction for armed burglary. Under both Fiore and Witt, due process principles of fundamental

grounds. See A.M. v. State, 765 So. 2d 927 (Fla. 2d DCA 2000). This legislation does not alter the definition of weapon in section 790.001(13) or the incorporation of that definition into the armed burglary provision under which Bunkley was convicted.

fairness require that Bunkley be entitled to pursue collateral relief.

ANSTEAD, C.J., concurs.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Second District - Case No. 2D99-4511

(Sarasota County)

R. John Cole, II, Sarasota, Florida,

for Petitioner

Richard E. Doran, Attorney General, Robert J. Krauss, Senior Assistant Attorney General, Chief of Criminal Law, and Ronald Napolitano, Assistant Attorney General, Tampa, Florida,

for Respondent

that sets out a per se rule. *See Walls v. State*, 730 So.2d 294 (Fla. 1st DCA 1999). Rule 3.850(b)(2) provides an exception to the two-year time limitation for filing postconviction motions where "a fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively." The test for determining whether an opinion should be applied retroactively was established in *Witt v. State*, 387 So.2d 922 (Fla.1980). In *Witt*, the court held that "only major constitutional changes of law" will be given retroactive effect so as to be cognizable under rule 3.850. *Id.* at 929. The court contrasted "major constitutional changes in the law" with "evolutionary refinements" in the law, stating:

> In contrast to jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters....

Witt, 387 So.2d at 929–30.

In *State v. Glenn*, 558 So.2d 4, 6 (Fla. 1990), the supreme court explained its earlier opinion in *Witt*, stating:

> We held that only major constitutional changes of law which constitute a development of fundamental significance are cognizable under a motion for postconviction relief. Most such "jurisprudential upheavals" in the law fall within two broad categories, i.e., decisions ... which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties, and decisions ... which are of such significant magnitude as to necessitate retroactive application as determined by the three-prong test as applied in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199] (1967).

(citations omitted).

Applying that test to this case, we hold that *L.B.* should not be applied retroactively. Accordingly, we affirm the trial court's order. However, because trial courts in Florida need a uniform statewide rule concerning the retroactivity of *L.B.*, we certify the following question as one of great public importance:

> SHOULD THE DECISION IN *L.B. v. STATE*, 700 SO.2D 370 (FLA.1997), THAT A FOLDING POCKETKNIFE WITH A BLADE OF FOUR INCHES OR LESS FALLS WITHIN THE STATUTORY EXCEPTION TO THE DEFINITION OF A "WEAPON" FOUND IN § 790.001(13), BE APPLIED RETROACTIVELY?

Affirmed.

BLUE, A.C.J., and CASANUEVA and DAVIS, JJ., Concur.

Joseph HERRMANN, Appellant,

v.

STATE of Florida, Appellee.

No. 2D00–1356.

District Court of Appeal of Florida, Second District.

Sept. 1, 2000.

Appeal pursuant to Fla. R.App. P. 9.140(i) from the Circuit Court for Pasco County; William R. Webb, Judge.

PER CURIAM.

Joseph Herrmann appeals the summary denial of his motion to correct a scoresheet error filed pursuant to Florida Rule of Criminal Procedure 3.800(a). Because Herrmann has stated a facially sufficient claim that is not refuted by the attachments to the trial court order, we reverse and remand for reconsideration.

Clyde Timothy BUNKLEY, Appellant,

v.

STATE of Florida, Appellee.

No. 2D99–4511.

District Court of Appeal of Florida, Second District.

Sept. 1, 2000.

Defendant who was convicted of armed burglary filed motion for postconviction relief. The Circuit Court, Sarasota County, Stephen L. Dakan, J., summarily denied motion, and defendant appealed. The District Court of Appeal held that *L.B. v. State* decision, holding that common pocket knife with blade of four inches or less was excluded from definition of "weapon," was not major change in law, but was merely evolutionary refinement of decisional law, and thus, it could not be retroactively applied through motion for postconviction relief.

Affirmed.

Question certified.

Criminal Law ⇐1456

L.B. v. State decision, holding that common pocket knife with blade of four inches or less was excluded from definition of "weapon," was not major change in law, but was merely evolutionary refinement of decisional law, and thus, it could not be retroactively applied through motion for postconviction relief. West's F.S.A. RCrP Rule 3.850.

R. John Cole, II, P.A., Sarasota, for Appellant.

No appearance required for Appellee.

PER CURIAM.

Clyde Timothy Bunkley appeals the summary denial of his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We affirm.

Bunkley was convicted of armed burglary after a jury trial on April 23, 1987. The arresting officer testified as to the following facts: Bunkley broke into a closed, unoccupied Western Sizzlin' Restaurant in the early morning hours, and was apprehended after leaving the structure with a common pocketknife in his pocket. At the time of Bunkley's arrest, the pocketknife, with a blade of 2¼ to 3 inches in length, was folded and in his pocket. There is no evidence indicating Bunkley ever used the pocketknife during the burglary, nor that he threatened anyone with the pocketknife at any time.

In his rule 3.850 motion, Bunkley contends the trial court erroneously allowed the jury to determine whether the pocketknife found in his possession could be considered a deadly weapon, rather than concluding it was not as a matter of law. Bunkley concedes that his motion was filed more than two years after his convictions on April 23, 1987, became final. He contends, however, that the arguments raised in his motion were not, supported by case law until the supreme court decided *L.B. v. State*, 700 So.2d 370 (Fla.1997), and that he filed his motion within two years from the date of that decision.

In *L.B.*, the Florida Supreme Court reversed this court's decision finding section 790.001(13), Florida Statutes (1995), unconstitutionally vague. At issue was the exclusion of a "common pocketknife" from the definition of "weapon" in section 790.001(13). *See L.B.*, 700 So.2d at 371. The Florida Supreme Court found that the statutory term was not so vague as to fail to put people of ordinary intelligence on notice of what constitutes forbidden conduct under the statute. *See id.* To define the term, the court relied upon an Attorney General's opinion that a common pocketknife was one with a blade of four inches or less. *Id.* (citing Op. Att'y Gen. Fla. 051–358 (1951)). The decision has been characterized by the First District as one

BEST AVAILABLE COPY

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA, CASE NO. 86-1070-CF-A-N1

vs.

CLYDE TIMOTHY BUNKLEY,

Defendant.

_____/

ORDER DISMISSING MOTION FOR POSTCONVICTION RELIEF

This matter is before the court on the Defendant's Motion for Postconviction Relief filed through counsel pursuant to Fla.R.Crim.P. 3.850 on September 21, 1999. The court has carefully considered the motion, reviewed the court file, and is otherwise duly advised in the premises.

The Defendant was convicted by a jury of Armed Burglary, Possession of Burglary Tools, and Resisting Arrest and he was sentenced on the Armed Burglary conviction to life in the Department of Corrections. The court's judgments and sentences were affirmed on appeal. Bunkley v. State, 539 So. 2d 177 (Fla. 2d DCA 1989) (Table).

The Defendant has filed, since the original Second District Court of Appeal's opinion affirming his conviction, several Petitions for Writ of Habeas Corpus as well as a Motion for Post Conviction Relief, in both Federal and State court. All of the Defendant's previous attempts at collateral relief have been unsuccessful.

In his Motion, the Defendant, now through counsel, argues that his sentence and conviction on count one, Armed Burglary, should be vacated because the Florida Supreme Court has in L.B. v. State, 700 So. 2d 370 (Fla. 1997), decided that a common pocketknife can not support a conviction involving possession of a weapon. The Defendant contends that the evidence adduced at trial, pertinent portions of which he has attached to his Motion, establish that the pocketknife he possessed at the time of his arrest meets the definition of the common pocketknife exception in section 790.001(13), Florida Statutes (1999). The Defendant contends that the change announced in L.B. should be applied retroactively based on the Second District Court of Appeal's decision in R.L.S. v. State, 732 So. 2d 39 (Fla. 2d DCA 1999), which the Defendant alleges, applied L.B. retroactively.

The Defendant's Motion is dismissed. The Defendant's reliance upon R.L.S. v. State, 732 So. 2d 39 (Fla. 2d DCA 1999), for determining retroactivity of the rule announced in L.B. v. State, 700 So. 2d 370 (Fla. 1997) is misplaced. As the Florida Supreme Court recently explained in Dixon v. State, 730 So. 2d 265 (Fla. 1999), before a prisoner can rely upon a decision announcing a fundamental change in the law to be applied retroactively, the Florida Supreme Court or United States Supreme Court must announce that its decision is to apply retroactively. Id. at. 268. Further, it is the date of the mandate of the decision announcing retroactivity that is the beginning date for calculating the additional two-year window. Id. at 267. The Supreme Court of Florida, to this court's knowledge, has not determined that its decision in L.B. v. State, 700 So. 2d 370 (Fla. 1997), is of fundamental significance that it should apply retroactively. This court, doubts, based on the limited number of opinions that are given retroactive effect whether the decision in L.B. will be given such an effect. See Glenn v. State, 558 So. 2d 4 (Fla. 1990). Therefore, it is appropriate to dismiss the Defendant's Motion without

prejudice to his right to reassert the issue if, and when, the Florida Supreme Court decides that the decision in L.B. v. State, 700 So. 2d 370 (Fla. 1997) applies retroactively.

Therefore, it is **ORDERED** and **ADJUDGED**:

1. . The motion, file and record conclusively establish that Defendant is entitled to no relief and Defendant's Motion for Postconviction Relief is dismissed.

2. The Defendant is advised that he has 30 days within which to appeal this order.

DONE and **ORDERED** in chambers in Sarasota, Sarasota County, Florida, on this 19 day of October, 1999.

Stephen L. Dakan, Circuit Judge.

Copies furnished by Judge's Office to :

Office of State Attorney.(without attachments)

CERTIFICATE OF SERVICE

I do certify that a copy hereof with attachments has been furnished to R. John Cole, II, Esquire, R. John Cole, P.A., 46 North Washington Boulevard, Suite 24, Sarasota, FL 34236 and Clyde Timothy Bunkley, DOC # 051390, Century Correctional Institution, 400 Tedder Road, Florida 32535 by U.S. Mail, on this 20 day of October, 1999.

Judicial Assistant

copy to Mr. Bunkley

MANDATE

SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the:

District Court of Appeal, Second District

WHEREAS, in that certain cause filed in this Court styled:

CLYDE TIMOTHY BUNKLEY vs. **STATE OF FLORIDA**

Case No.: **SC01-297**

Your Case No.: **2D99-4511**

The attached opinion was rendered on: **11/21/2002**

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS, The Honorable HARRY LEE ANSTEAD, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 12th day of December, 2002.

SUPREME COURT OF THE STATE OF FLORIDA

Clerk of the Supreme Court of Florida

NO. 02-8636

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

CLYDE TIMOTHY BUNKLEY – PETITIONER

VS.

STATE OF FLORIDA – RESPONDENT

PROOF OF SERVICE

I, Clyde Timothy Bunkley, do swear or declare that on this date, January 13, 2003, as required by Supreme Court Rule 29, I have served the enclosed Motion to Proceed *In Forma Pauperis* and Petition For Writ of Certiorari on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the U.S. Mail properly addressed to each of them and with first class postage prepaid.

The name and address of the Respondents is as follows: Office of the Attorney General, 2002 N. Lois Ave., Suite 700, Tampa, Florida 33607-2367.

I DECLARE UNDER PENALTY OF PERJURY that the foregoing is true and correct.

Clyde Timothy Bunkley

NOTARIZED OATH

STATE OF FLORIDA)
)
COUNTY OF POLK)

Before me, the undersigned authority, this day personally appeared Clyde T. Bunkley, who first being duly sworn, says that he is the Petitioner in the above-styled cause, that he has read the foregoing Affidavit (or has had it read to him and understands it) and he has personal knowledge of the facts and matters therein set forth and alleged and that each and all of these facts and matters are true and correct.

Clyde T. Bunkley
(your signature)

SWORN AND SUBSCRIBED TO before me this 13th day of January, 2003.

NOTARY PUBLIC

C. JOYNER
MY COMMISSION # CC 868192
EXPIRES April 24 2004

My Commission Expires

Personally known ___ or produced identification ✓.
Type of identification produced: Florida Department of Corrections Inmate I.D. Card.

IBSR176 (90) — FLORIDA DEPARTMENT OF CORRECTIONS — 12/11/02
INITIAL PAYMENT FOR FILE FEE — 12:14:39
FOR: 12/10/2002 — PAGE 1

DC # : 051390 INMT NAME : BUNKLEY, CLYDE T. CURR BAL : $ 200.15
HOLDS : $ 0.00 LIENS : $ 0.00 SPENDABLE : $ 120.15

DATE RANGE	MONTHLY AVERAGE DEPOSITS	MONTHLY AVERAGE BALANCES
06/13 - 07/12	$ 58.50	$ 92.75
07/13 - 08/11	$ 29.20	$ 55.17
08/12 - 09/10	$ 47.77	$ 58.23
09/11 - 10/10	$ 70.00	$ 43.64
10/11 - 11/09	$ 42.50	$ 20.10
11/10 - 12/09	$ 51.67	$ 17.53

AVERAGE OVER 6 MONTHS DEPOSITS : $ 49.44
BALANCES : $ 47.90

CALCULATED INITIAL PAYMENT : $ 9.89

IBSR140 (74) — FLORIDA DEPARTMENT OF CORRECTIONS — 12/11/02
TRUST FUND ACCOUNT STATEMENT — 11:51:59
FOR: 06/10/2002 - 12/10/2002 — PAGE 1

ACCT NAME: BUNKLEY, CLYDE T. ACCT#: 051390
BED: A3105U TYPE: INMATE TRUST
PO BOX:

BEGINNING BALANCE 06/10/02 $50.23

POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
06/10/02	103	CANTEEN SALES	50320020609	000		-	$3.72	$46.51
06/10/02	103	CANTEEN SALES	50320020609	000		-	$0.92	$45.59
06/11/02	099	CANTEEN SALES	50320020610	000		-	$3.30	$42.29
06/12/02	103	CANTEEN SALES	50320020611	000		-	$2.72	$39.57
06/13/02	103	CANTEEN SALES	50320020612	000		-	$4.84	$34.73
06/14/02	103	CANTEEN SALES	50320020613	000		-	$3.40	$31.33
06/15/02	101	CANTEEN SALES	50320020614	000		-	$5.68	$25.65
06/17/02	103	CANTEEN SALES	50320020616	000		-	$5.22	$20.43
06/19/02	518	MONEY ORDER	03009545763	999	MULTON, MARDY	+	$100.00	$120.43
06/20/02	103	CANTEEN SALES	50320020619	000		-	$3.38	$117.05
06/21/02	223	PRIDE PAYROLL	0044933	000	PRIDE (AUTOMATED)	+	$33.98	$151.03
06/22/02	103	CANTEEN SALES	50320020621	000		-	$3.30	$147.73
06/23/02	045	CANTEEN SALES	50320020622	000		-	$14.78	$132.95
06/24/02	081	CANTEEN SALES	50320020623	000		-	$4.67	$128.28
06/25/02	103	CANTEEN SALES	50320020624	000		-	$3.52	$124.76
06/26/02	101	CANTEEN SALES	50320020625	000		-	$7.13	$117.63
06/27/02	103	CANTEEN SALES	50320020626	000		-	$2.42	$115.21
06/29/02	097	CANTEEN SALES	50320020628	000		-	$2.44	$112.77
06/30/02	101	CANTEEN SALES	50320020629	000		-	$6.80	$105.97
06/30/02	101	CANTEEN SALES	50320020629	000		-	$1.94	$104.03
07/01/02	103	CANTEEN SALES	50320020630	000		-	$6.30	$97.73

ACCT NAME: BUNKLEY, CLYDE T. ACCT#: 051390
BED: A3105U TYPE: INMATE TRUST
PO BOX:

POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
07/01/02	103	CANTEEN SALES	50320020630	000		-	$1.74	$95.99
07/02/02	103	CANTEEN SALES	50320020701	000		-	$5.93	$90.06
07/04/02	103	CANTEEN SALES	50320020703	000		-	$5.29	$84.77
07/05/02	099	CANTEEN SALES	50320020704	000		-	$1.13	$83.64
07/05/02	136	PRIDE PAYROLL	0046808	000	PRIDE (AUTOMATED)	+	$32.51	$116.15
07/06/02	101	CANTEEN SALES	50320020705	000		-	$3.34	$112.81
07/07/02	101	CANTEEN SALES	50320020706	000		-	$3.24	$109.57
07/07/02	101	CANTEEN SALES	50320020706	000		-	$3.18	$106.39
07/08/02	095	CANTEEN SALES	50320020707	000		-	$9.22	$97.17
07/09/02	101	CANTEEN SALES	50320020708	000		-	$5.40	$91.77
07/10/02	101	CANTEEN SALES	50320020709	000		-	$3.20	$88.57
07/11/02	101	CANTEEN SALES	50320020710	000		-	$2.72	$85.85
07/11/02	101	CANTEEN SALES	50320020710	000		-	$4.11	$81.74
07/13/02	101	CANTEEN SALES	50320020712	000		-	$2.22	$79.52
07/14/02	103	CANTEEN SALES	50320020713	000		-	$3.87	$75.65
07/14/02	103	CANTEEN SALES	50320020713	000		-	$8.16	$67.49
07/15/02	103	CANTEEN SALES	50320020714	000		-	$1.24	$66.25
07/15/02	103	CANTEEN SALES	50320020714	000		-	$1.64	$64.61
07/16/02	101	CANTEEN SALES	50320020715	000		-	$2.64	$61.97
07/18/02	103	CANTEEN SALES	50320020717	000		-	$4.02	$57.95
07/19/02	101	CANTEEN SALES	50320020718	000		-	$2.83	$55.12
07/19/02	218	PRIDE PAYROLL	0048682	000	PRIDE (AUTOMATED)	+	$28.13	$83.25
07/20/02	103	CANTEEN SALES	50320020719	000		-	$2.00	$81.25

ACCT NAME: BUNKLEY, CLYDE T. ACCT#: 051390
BED: A3105U TYPE: INMATE TRUST
PO BOX:

POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
07/20/02	103	CANTEEN SALES	50320020719	000		-	$6.00	$75.25
07/21/02	101	CANTEEN SALES	50320020720	000		-	$4.08	$71.17
07/22/02	101	CANTEEN SALES	50320020721	000		-	$2.19	$68.98
07/23/02	101	CANTEEN SALES	50320020722	000		-	$3.24	$65.74
07/24/02	101	CANTEEN SALES	50320020723	000		-	$5.05	$60.69
07/26/02	103	CANTEEN SALES	50320020725	000		-	$2.94	$57.75
07/28/02	103	CANTEEN SALES	50320020727	000		-	$5.36	$52.39
07/29/02	097	CANTEEN SALES	50320020728	000		-	$4.01	$48.38
07/29/02	097	CANTEEN SALES	50320020728	000		-	$1.06	$47.32
07/30/02	089	CANTEEN SALES	50320020729	000		-	$4.47	$42.85
07/31/02	087	CANTEEN SALES	50320020730	000		-	$2.65	$40.20
08/01/02	101	CANTEEN SALES	50320020731	000		-	$4.42	$35.78
08/02/02	099	CANTEEN SALES	50320020801	000		-	$1.16	$34.62
08/02/02	238	PRIDE PAYROLL	0050557	000	PRIDE (AUTOMATED)	+	$30.26	$64.88
08/03/02	101	CANTEEN SALES	50320020802	000		-	$6.09	$58.79
08/04/02	105	CANTEEN SALES	50320020803	000		-	$3.34	$55.45
08/04/02	105	CANTEEN SALES	50320020803	000		-	$1.02	$54.43
08/05/02	101	CANTEEN SALES	50320020804	000		-	$5.02	$49.41
08/06/02	101	CANTEEN SALES	50320020805	000		-	$3.54	$45.87
08/07/02	101	CANTEEN SALES	50320020806	000		-	$6.16	$39.71
08/07/02	101	CANTEEN SALES	50320020806	000		-	$1.76	$37.95
08/08/02	103	CANTEEN SALES	50320020807	000		-	$1.95	$36.00
08/09/02	103	CANTEEN SALES	50320020808	000		-	$1.94	$34.06

ACCT NAME: BUNKLEY, CLYDE T. ACCT#: 051390
BED: A3105U TYPE: INMATE TRUST
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POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
08/10/02	101	CANTEEN SALES	50320020809	000		-	$3.02	$31.04
08/11/02	103	CANTEEN SALES	50320020810	000		-	$1.56	$29.48
08/12/02	097	CANTEEN SALES	50320020811	000		-	$3.44	$26.04
08/13/02	101	CANTEEN SALES	50320020812	000		-	$5.28	$20.76
08/14/02	103	CANTEEN SALES	50320020813	000		-	$3.69	$17.07
08/15/02	103	CANTEEN SALES	50320020814	000		-	$1.48	$15.59
08/16/02	173	PRIDE PAYROLL	0052364	000	PRIDE (AUTOMATED)	+	$29.93	$45.52
08/17/02	103	CANTEEN SALES	50320020816	000		-	$7.48	$38.04
08/17/02	103	CANTEEN SALES	50320020816	000		-	$1.38	$36.66
08/18/02	105	CANTEEN SALES	50320020817	000		-	$3.08	$33.58
08/18/02	105	CANTEEN SALES	50320020817	000		-	$1.16	$32.42
08/19/02	103	CANTEEN SALES	50320020818	000		-	$1.60	$30.82
08/19/02	103	CANTEEN SALES	50320020818	000		-	$2.86	$27.96
08/20/02	103	CANTEEN SALES	50320020819	000		-	$2.12	$25.84
08/20/02	103	CANTEEN SALES	50320020819	000		-	$1.82	$24.02
08/21/02	103	CANTEEN SALES	50320020820	000		-	$2.80	$21.22
08/21/02	103	CANTEEN SALES	50320020820	000		-	$0.90	$20.32
08/22/02	103	CANTEEN SALES	50320020821	000		-	$1.70	$18.62
08/22/02	516	MONEY ORDER	063471921126	999	UNKNOWN	+	$100.00	$118.62
08/23/02	103	CANTEEN SALES	50320020822	000		-	$2.24	$116.38
08/23/02	103	CANTEEN SALES	50320020822	000		-	$0.58	$115.80
08/24/02	101	CANTEEN SALES	50320020823	000		-	$2.64	$113.16
08/24/02	101	CANTEEN SALES	50320020823	000		-	$1.04	$112.12

ACCT NAME: BUNKLEY, CLYDE T. ACCT#: 051390
BED: A3105U TYPE: INMATE TRUST
PO BOX:

POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
08/25/02	107	CANTEEN SALES	50320020824	000		-	$9.98	$102.14
08/26/02	103	CANTEEN SALES	50320020825	000		-	$2.48	$99.66
08/27/02	103	CANTEEN SALES	50320020826	000		-	$8.09	$91.57
08/27/02	103	CANTEEN SALES	50320020826	000		-	$2.06	$89.51
08/28/02	101	CANTEEN SALES	50320020827	000		-	$4.10	$85.41
08/28/02	101	CANTEEN SALES	50320020827	000		-	$5.26	$80.15
08/29/02	103	CANTEEN SALES	50320020828	000		-	$1.90	$78.25
08/30/02	103	CANTEEN SALES	50320020829	000		-	$3.26	$74.99
08/30/02	153	PRIDE PAYROLL	0053973	000	PRIDE (AUTOMATED)	+	$13.39	$88.38
08/31/02	099	CANTEEN SALES	50320020830	000		-	$4.22	$84.16
09/01/02	103	CANTEEN SALES	50320020831	000		-	$7.48	$76.68
09/02/02	103	CANTEEN SALES	50320020901	000		-	$1.62	$75.06
09/03/02	103	CANTEEN SALES	50320020902	000		-	$7.27	$67.79
09/04/02	099	CANTEEN SALES	50320020903	000		-	$5.46	$62.33
09/04/02	099	CANTEEN SALES	50320020903	000		-	$5.46	$56.87
09/04/02	099	CANTEEN SALES	50320020903	000		-	$0.92	$55.95
09/05/02	121	CANTEEN SALES	50320020904	000		-	$5.10	$50.85
09/06/02	101	CANTEEN SALES	50320020905	000		-	$5.23	$45.62
09/07/02	099	CANTEEN SALES	50320020906	000		-	$6.44	$39.18
09/09/02	091	CANTEEN SALES	50320020908	000		-	$6.60	$32.58
09/09/02	091	CANTEEN SALES	50320020908	000		-	$1.16	$31.42
09/10/02	101	CANTEEN SALES	50320020909	000		-	$1.44	$29.98
09/11/02	101	CANTEEN SALES	50320020910	000		-	$2.16	$27.82

ACCT NAME: BUNKLEY, CLYDE T. ACCT#: 051390
BED: A3105U TYPE: INMATE TRUST
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POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
09/12/02	099	CANTEEN SALES	50320020911	000		-	$2.98	$24.84
09/13/02	101	CANTEEN SALES	50320020912	000		-	$3.20	$21.64
09/13/02	101	CANTEEN SALES	50320020912	000		-	$2.13	$19.51
09/13/02	502	MONEY ORDER	063141141075	999	LEMASTERS, DORIS	+	$70.00	$89.51
09/14/02	097	CANTEEN SALES	50320020913	000		-	$2.86	$86.65
09/14/02	097	CANTEEN SALES	50320020913	000		-	$1.44	$85.21
09/15/02	101	CANTEEN SALES	50320020914	000		-	$4.05	$81.16
09/16/02	099	CANTEEN SALES	50320020915	000		-	$3.57	$77.59
09/18/02	101	CANTEEN SALES	50320020917	000		-	$5.02	$72.57
09/19/02	101	CANTEEN SALES	50320020918	000		-	$2.12	$70.45
09/19/02	101	CANTEEN SALES	50320020918	000		-	$2.85	$67.60
09/20/02	099	CANTEEN SALES	50320020919	000		-	$2.94	$64.66
09/21/02	099	CANTEEN SALES	50320020920	000		-	$1.84	$62.82
09/22/02	107	CANTEEN SALES	50320020921	000		-	$4.65	$58.17
09/23/02	101	CANTEEN SALES	50320020922	000		-	$6.77	$51.40
09/24/02	101	CANTEEN SALES	50320020923	000		-	$2.22	$49.18
09/25/02	099	CANTEEN SALES	50320020924	000		-	$2.70	$46.48
09/26/02	101	CANTEEN SALES	50320020925	000		-	$3.47	$43.01
09/27/02	101	CANTEEN SALES	50320020926	000		-	$1.28	$41.73
09/28/02	099	CANTEEN SALES	50320020927	000		-	$1.92	$39.81
09/29/02	105	CANTEEN SALES	50320020928	000		-	$2.02	$37.79
09/29/02	105	CANTEEN SALES	50320020928	000		-	$1.46	$36.33
09/30/02	101	CANTEEN SALES	50320020929	000		-	$1.62	$34.71

ACCT NAME: BUNKLEY, CLYDE T. ACCT#: 051390
BED: A3105U TYPE: INMATE TRUST
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POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
10/01/02	101	CANTEEN SALES	50320020930	000		-	$5.22	$29.49
10/02/02	099	CANTEEN SALES	50320021001	000		-	$2.65	$26.84
10/03/02	099	CANTEEN SALES	50320021002	000		-	$2.42	$24.42
10/04/02	101	CANTEEN SALES	50320021003	000		-	$2.62	$21.80
10/05/02	101	CANTEEN SALES	50320021004	000		-	$2.70	$19.10
10/06/02	105	CANTEEN SALES	50320021005	000		-	$1.82	$17.28
10/06/02	105	CANTEEN SALES	50320021005	000		-	$1.24	$16.04
10/08/02	101	CANTEEN SALES	50320021007	000		-	$3.18	$12.86
10/09/02	099	CANTEEN SALES	50320021008	000		-	$3.38	$9.48
10/09/02	099	CANTEEN SALES	50320021008	000		-	$2.83	$6.65
10/10/02	101	CANTEEN SALES	50320021009	000		-	$2.02	$4.63
10/10/02	101	CANTEEN SALES	50320021009	000		-	$0.89	$3.74
10/11/02	101	CANTEEN SALES	50320021010	000		-	$1.26	$2.48
10/12/02	101	CANTEEN SALES	50320021011	000		-	$2.02	$0.46
10/24/02	528	MONEY ORDER	065544794700	999	REGAN, SANDI	+	$50.00	$50.46
10/25/02	101	CANTEEN SALES	50320021024	000		-	$0.34	$50.12
10/27/02	105	CANTEEN SALES	50320021026	000		-	$28.22	$21.90
10/28/02	101	CANTEEN SALES	50320021027	000		-	$2.80	$19.10
10/29/02	099	CANTEEN SALES	50320021028	000		-	$2.64	$16.46
10/29/02	099	CANTEEN SALES	50320021028	000		-	$1.16	$15.30
10/29/02	531	MONEY ORDER	060243321354	999	BUNKLEY, BOBBY	+	$35.00	$50.30
10/30/02	101	CANTEEN SALES	50320021029	000		-	$2.44	$47.86
10/31/02	101	CANTEEN SALES	50320021030	000		-	$2.50	$45.36

ACCT NAME: BUNKLEY, CLYDE T.
BED: A3105U
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ACCT#: 051390
TYPE: INMATE TRUST

POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
11/01/02	101	CANTEEN SALES	50320021031	000		-	$5.12	$40.24
11/02/02	097	CANTEEN SALES	50320021101	000		-	$2.86	$37.38
11/03/02	101	CANTEEN SALES	50320021102	000		-	$3.38	$34.00
11/04/02	101	CANTEEN SALES	50320021103	000		-	$2.54	$31.46
11/05/02	101	CANTEEN SALES	50320021104	000		-	$2.69	$28.77
11/06/02	099	CANTEEN SALES	50320021105	000		-	$4.72	$24.05
11/08/02	101	CANTEEN SALES	50320021107	000		-	$2.19	$21.86
11/09/02	101	CANTEEN SALES	50320021108	000		-	$3.87	$17.99
11/11/02	101	CANTEEN SALES	50320021110	000		-	$4.39	$13.60
11/12/02	101	CANTEEN SALES	50320021111	000		-	$2.02	$11.58
11/13/02	101	CANTEEN SALES	50320021112	000		-	$2.26	$9.32
11/14/02	101	CANTEEN SALES	50320021113	000		-	$3.04	$6.28
11/15/02	101	CANTEEN SALES	50320021114	000		-	$2.02	$4.26
11/15/02	502	MONEY ORDER	063717518193	999	LEMASTER, DORIS	+	$20.00	$24.26
11/16/02	097	CANTEEN SALES	50320021115	000		-	$1.52	$22.74
11/19/02	099	CANTEEN SALES	50320021118	000		-	$2.03	$20.71
11/20/02	099	CANTEEN SALES	50320021119	000		-	$3.39	$17.32
11/21/02	101	CANTEEN SALES	50320021120	000		-	$3.14	$14.18
11/22/02	101	CANTEEN SALES	50320021121	000		-	$5.89	$8.29
11/24/02	101	CANTEEN SALES	50320021123	000		-	$3.14	$5.15
11/25/02	101	CANTEEN SALES	50320021124	000		-	$2.26	$2.89
11/27/02	101	CANTEEN SALES	50320021126	000		-	$2.48	$0.41
11/27/02	508	MONEY ORDER	065544798426	999	UNKNOWN	+	$35.00	$35.41

ACCT NAME: BUNKLEY, CLYDE T.
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ACCT#: 051390
TYPE: INMATE TRUST

POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
11/30/02	099	CANTEEN SALES	50320021129	000		-	$6.22	$29.19
11/30/02	099	CANTEEN SALES	50320021129	000		-	$2.80	$26.39
12/01/02	101	CANTEEN SALES	50320021130	000		-	$5.34	$21.05
12/02/02	101	CANTEEN SALES	50320021201	000		-	$4.40	$16.65
12/03/02	101	CANTEEN SALES	50320021202	000		-	$4.84	$11.81
12/04/02	099	CANTEEN SALES	50320021203	000		-	$6.30	$5.51
12/05/02	099	CANTEEN SALES	50320021204	000		-	$2.26	$3.25
12/06/02	101	CANTEEN SALES	50320021205	000		-	$0.92	$2.33
12/07/02	099	CANTEEN SALES	50320021206	000		-	$0.92	$1.41
12/08/02	101	CANTEEN SALES	50320021207	000		-	$1.26	$0.15
12/09/02	508	MONEY ORDER	063717519957	999	LEMASTERS, DORIS	+	$100.00	$100.15
12/10/02	512	MONEY ORDER	065495720913	999	UNKNOWN	+	$100.00	$200.15

ENDING BALANCE 12/10/02 $200.15